Supreme Court, U.S.
FILED
FEB 2 1999
CLERK

No. 98-934

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

OBIORA E. EGBUNA,
Petitioner,

v.

TIME-LIFE LIBRARIES, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

JOHN P. RACIN
WEISSBRODT & RACIN
1721 Lamont Street, N.W.
Washington, D.C. 20010
(202) 265-2516

NINA J. GINSBERG
DIMURO, GINSBERG
& LIEBERMAN
908 King Street, Suite 200
Alexandria, VA 22314
(703) 684-4333

MARSHA S. BERZON
MICHAEL RUBIN
(Counsel of Record)
KATHLEEN MORRIS
ALTSHULER, BERZON, NUSSBAUM,
BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

EEOC v. L.B. Foster, 123 F.3d 746 (3d Cir. 1997) 8, 9
Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 5
Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) 8, 9
Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) 8, 9
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*
McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) ..... *passim*
Murphy v. Derwinski, 990 F.2d 540 (10th Cir. 1993) 9
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) .. 9
Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) 6
Smith v. Sec'y of the Navy, 659 F.2d 1113 (D.C. Cir. 1981) 9
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 4, 5
Wideman v. Wal-Mart Stores, 141 F.3d 1453 (11th Cir. 1998) 8, 9

STATUTES

8 U.S.C. § 1324a ..... *passim*
42 U.S.C. § 2000e-3 ..... *passim*

LEGISLATIVE HISTORY

H.R. Rep. No. 99-682(II) (1986) 7
H.R. Rep. No. 102-40(II) (1991) 8

ADMINISTRATIVE MATERIALS

EEOC Guidance on Investigating, Analyzing Retaliation Claims, BNA Daily Labor Report D-27 (May 26, 1998) 8, 9
Memorandum GC 98-15, "Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court precedent," BNA Daily Labor Report E-1 (Dec. 30, 1998) 5

ARGUMENT

Respondent TLLI's Brief in Opposition (Opp. Cert.) rests upon a fundamental mischaracterization of both the Fourth Circuit's decision and the record below. In an effort to justify the lower court's holding and to avoid the clear conflicts among the circuits on both Questions Presented, respondent repeatedly asserts, without any citation to the record, that it could not legally *and would not in fact* have re-hired Obiora Egbuna in July 1993. *See, e.g.*, Opp. Cert. 3, 6, 8, 9-10, 12-13. TLLI thereby tries to conform the Fourth Circuit's decision to cases in which plaintiffs proceeding under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), have been required to show that they met qualifications *actually imposed* by the employer in order to establish a discriminatory motive through circumstantial evidence. But respondent cannot avoid *certiorari* by so blatantly recasting the facts and holding below, nor is the *McDonnell Douglas* line of cases relevant here at all.

1. The Fourth Circuit did not base its holding or analysis on the narrow factual grounds that respondent now urges. Rather, the Fourth Circuit accepted what it understood to be TLLI's absolutist position on the unavailability of Title VII protection to undocumented workers (*see* Pet. App. 3a), and sweepingly ruled that Obiora Egbuna simply was not covered by Title VII *because he was an undocumented worker.*[1] By its terms, that ruling applies to *every* undocumented worker who is retaliated against

---

[1] *See, e.g.*, Pet. App. 5a ("We find, however, that Egbuna has no cause of action because his undocumented status rendered him ineligible . . . for employment within the United States"); *id.* (emphasis in original) ("A plaintiff is entitled to [Title VII] remedies *only* upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being 'qualified' for the position is not determined by the applicant's capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question. Congress so declared in [IRCA]"); *id.* 7a (emphasis in original) ("Given Congress' unequivocal declaration that it is illegal to hire unauthorized aliens *and its mandate that employers immediately discharge unauthorized aliens* upon discov-

or otherwise discriminated against in employment by *any* employer, whether that employer is law abiding or a routine IRCA violator, whether that employer requires prospective employees to submit work authorization documents *before* any job offers are made, *after* job offers are made, or *never*, and whether the discrimination involved initial or continued employment.

2. Indeed, the Fourth Circuit could not have ruled on the narrow factual grounds TLLI now puts forward, because the company's self-serving characterization of the facts is contradicted by the record below. The *only* evidence presented by TLLI on summary judgment to establish what it "would have" done was the declaration of its Regional Human Resources Director, who stated:

> 3. *After hiring a new employee* at TLLI, *on the first day of training*, the new employee is required to complete an Immigration and Naturalization Service Form I-9 and provide the identification and proof of authorization for employment required by the Immigration Reform and Control Act, 8 U.S.C. § 1325a.
>
> 4. If the newly hired employee is unable to produce the required documentation, *he or she is given three days to provide it.*

Jt. App. 79 (emphasis added). That declaration on its face controverts TLLI's present characterization of the record by unequivocally establishing that: 1) TLLI did *not* have a policy of asking any new employee for work authorization documents until "[a]fter" that employee had been hired and had begun training; and 2) TLLI had a policy (as all employers must under IRCA) of giving *all*

---

ering their undocumented status, we cannot reverse the district court's grant of summary judgment in favor of TLLI. To do so would . . . . expose TLLI to civil and criminal penalties, and illogically create an entitlement . . . . despite [Egbuna] having been statutorily *disqualified* from employment in the United States"); *id.* 7a-8a (emphasis added) ("to rule Egbuna was entitled to the position he sought and to order TLLI to hire an undocumented alien would nullify IRCA, which declares it illegal to hire *or to continue to employ* unauthorized aliens").

new employees *at least three days* to produce work authorization documents *after* they actually begin work. Thus, although Egbuna lacked work authorization documents in July 1993, nothing in TLLI's policy (or IRCA) precluded respondent from making him a job offer to start work either immediately or on some future date, or from actually employing him for up to three days before he was required to produce those documents.[2]

Petitioner also presented evidence that if TLLI had asked him to produce work authorization documents in July 1993, he could have complied with that request by filing his non-frivolous political asylum application, thus obtaining immediate work authorization; Egbuna did exactly that in December 1993 and obtained prompt work authorization. *See* Pet. 4-5.[3] Petitioner also argued, based on evidence that his former supervisor wanted to create a new management position just for him (Jt.App. 9-11), that TLLI would likely have kept its job offer open for a reasonable period of time after July if he needed it to obtain work authorization. Finally, petitioner argued that despite TLLI's evidence that it required work authoriza-

---

[2] TLLI does not dispute that IRCA provides a three-day window period for a worker to submit work authorization documents, but contends that petitioner is precluded from relying on that fact because he did not argue it below. Petitioner, however, consistently argued that he is entitled to backpay under *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), for *any* period he would have worked. The three-day grace period, available as a matter of law, is simply one more basis for concluding on the present record that petitioner would in fact have returned to work for TLLI for at least *some* period of time, absent the retaliatory discrimination.

[3] Jt. App. 86 (Egbuna Decl. ¶ 8) ("Had [supervisor Ian] Clarke or any Time-Life official ever said that work authorization would be a barrier to employment despite the forty months I had worked for the company without it, I could have applied for asylum sooner, and I believe that, but for my witness status in the Harrison Jackson case, the company would have accommodated me by employing me while the question of work authorization status was pending before the INS, or at the very least held the position open for me until the INS granted me authorization").

tion documents from every "new employee" (Jt.App. 79), there was a factual dispute whether TLLI would have enforced that requirement against petitioner, because: 1) Egbuna was a returning (rather than a "new") TLLI employee, with almost four years of previous employment at the company and only a two-month break in service; and 2) TLLI had employed Egbuna from December 1989 to April 1993 even though the supervisor who supported his June 1993 re-hire knew that he lacked work authorization that entire period. Jt.App. 9-11, 84-86 ¶ 3, ¶ 6.

The initial panel concluded on the basis of these arguments that the evidence raised "factual questions [that] are best left for the district court to consider on remand" concerning whether Egbuna would have been re-hired by TLLI absent retaliation. Pet. App. 19a, 21a n.5. The *en banc* court did not disagree with the panel's conclusion regarding the state of the record, but ruled in effect that because of Egbuna's immigration status when he applied for the position, he had no claim for relief even if TLLI *would* have hired him anyway, or hired him contingent on his promptly obtaining work authorization. TLLI cannot now avoid *certiorari* by recasting the Fourth Circuit's broad summary judgment holding as if it rested on facts that are either refuted by the record or the subject of substantial factual dispute.

3. Even if TLLI were correct on the facts, and even if the Fourth Circuit had rested its holding on those facts, that holding would still be contrary to the decisions of this Court in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and *McKennon*, and to the decisions of the many circuit courts cited in the petition, and would be in no way inconsistent with *McDonnell Douglas* and its progeny, which are essentially irrelevant for present purposes.

a. In TLLI's brief discussion of the immigration law issues, it attempts to distinguish *Sure-Tan* and the post-*Sure-Tan* cases in the Second, Seventh, Ninth, and Eleventh Circuits (*see* Pet. 9-18) by arguing that this is a discriminatory refusal-to-hire case while those were dis-

criminatory discharge or illegal on-the-job treatment cases. *See* Opp. Cert. 17-20. That distinction is meaningless. Those cases held that Congress intended federal employment law to protected undocumented as well as documented workers. The reasoning of those cases fully applies to *all* claims brought under those statutes, with no exception for refusal-to-hire claims.

This Court held in *Sure-Tan* and *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), that undocumented workers were protected under the NLRA and Title VII because the plain language and structure *of those statutes*, and the federal employment policies they served, compelled that result. *See* Pet. 10-12. Except for the Fourth Circuit below, every circuit court to revisit that issue after IRCA concluded that Congress had *not* intended to repeal or modify those holdings. *See* Pet. 12-18. Not only is IRCA devoid of any language amending the coverage provisions of Title VII or the NLRA, but the key IRCA Committee Reports repeatedly expressed Congress' intent that IRCA's new employer sanctions provisions should not be construed to deprive undocumented workers of existing employment law protections. *Id.*[4]

Neither Title VII, nor any other federal employee protective statute, nor IRCA, creates on its face an exception for hiring cases to the general principle, accepted in *Espinoza*, *Sure-Tan*, and all the post-IRCA circuit court cases, that undocumented workers are covered under those statutes. Thus, where—as here—the statute upon which suit is based generally proscribes discrimination in hiring against individuals within the statute's protections, there is no basis in IRCA for carving out an exception simply because that discrimination occurred in the hiring process. *See* Pet. 19.

---

[4] The General Counsel of the NLRB recently issued a new Policy Memorandum endorsing that construction as well. *See* Memorandum GC 98-15, "Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court precedent," BNA Daily Labor Reports at E-1 (Dec. 30, 1998).

Moreover, although TLLI persists in analyzing this as a discriminatory refusal-to-hire case, in fact this is a retaliation case, in which TLLI's victim was a former employee who engaged in protected statutory activity while previously employed. *See Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 845, 849 (1997) (Title VII prohibits retaliation against former employee); *see* Pet. App. 15a n.1. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3, makes it unlawful for an employer "to discriminate against any of his employees or applicants for employment . . . because he has . . . participated in any manner, in an investigation, proceeding, or hearing under this title." The gravamen of petitioner's complaint is that TLLI unlawfully retaliated against Egbuna for his *on-the-job* conduct in supporting a supervisee's sex harassment claim in early 1993 (when Egbuna was still employed by TLLI), even though that retaliation was not manifested until TLLI refused to re-hire petitioner in July 1993.

Federal immigration policy *is* furthered by Title VII's protection of undocumented workers against unlawful retaliation for on-the-job conduct. Indeed, IRCA's House Education and Labor Committee Report said as much in explaining why the new employer sanctions provisions were not intended to strip undocumented workers of their employment law rights:

> [T]he Committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented employees *for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counterproductive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.*

House Comm. on Educ. and Labor, H.R. Rep. No. 99-682(II) at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5758 (emphasis added).

Limiting Title VII's protection against retaliation, as has the Fourth Circuit, provides an incentive for employers to hire undocumented workers, *contrary to the federal immigration policy of discouraging such hiring.* For, if the Fourth Circuit's limitations stand, employers will know that: 1) because undocumented workers are not fully protected by the proscription against retaliation, they will likely suffer in silence when Title VII violations are committed against them or their co-workers; and 2) legally-employed workers as well as undocumented workers are likely to be deterred from invoking Title VII rights if any co-workers, undocumented or not, are retaliated against for supporting such invocation.

b. Respondent's principal response to petitioner's Title VII analysis is that the Fourth Circuit's "quite narrow" holding is consistent with many cases in which plaintiffs failed to establish an inference of discrimination because they did not possess a qualification "that the employer in fact requires for employment." *See* Opp. Cert. 6. As demonstrated above, the record in *this* case does *not* establish that respondent in fact imposed such a qualification, and the Fourth Circuit did not narrowly rest its holding on such an assumption. Thus, although TLLI now cites a series of cases that purportedly support the decision below (*see* Opp. Cert. 7-8 n.5), those cases merely stand for the unremarkable proposition that plaintiffs must show that they satisfied the minimum qualifications actually required for the job in proving discriminatory intent under the *McDonnell Douglas* standard.

Further, and critically, as petitioner pointed out in Pet. 22-26, the *McDonnell Douglas* criteria do not appear as prerequisites to Title VII protection in the statute, but have been judicially developed as one of several sets of criteria for determining whether a plaintiff has presented evidence sufficient to support an inference of discriminatory intent based on circumstantial evidence.[5] Where, as

[5] Indeed, in retaliation cases, "qualification" is usually not mentioned as one of the factors that the plaintiff must establish in

here, a known discriminatory motive is assumed for summary judgment purposes—and the actual motive was, in any case, *not* Egbuna's immigration status, as TLLI concedes (Opp. Cert. 2-3)—the question whether circumstantial evidence supports an inference of discrimination simply is not relevant to the issue before the Court, and the *McDonnell Douglas* line of cases has no pertinence.

3. Finally, TLLI's entire presentation assumes that under Title VII as amended, if a retaliatory or otherwise discriminatory act does not cause an actual loss of wages or other economic injury, no cause of action is available. That is not the law, especially after the Civil Rights Act of 1991. *Cf. Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283 (1998), *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (although Title VII "mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to 'economic' or 'tangible' discrimination"); H. Rep. No. 102-40(II), 102nd Cong., 1st Sess. at 27-28 (1991) (explaining need for compensatory and punitive damages remedies in cases where plaintiff was discriminated against but suffered no economic injury).

If that is what the Fourth Circuit held, as TLLI now posits, the case is all the more certworthy. The question

---

order to create an inference of discriminatory motive sufficient to survive dismissal. Rather, the elements of a *prima facie* case of retaliation are usually articulated as including: 1) that the plaintiff "engaged in statutorily protected expression"; 2) that plaintiff "suffered an adverse employment action"; and 3) that "the adverse action was causally related to the protected expression." *See, e.g., Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1454 (11th Cir. 1998); *Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Cir. 1997); *EEOC v. L.B. Foster*, 123 F.3d 746 (3d Cir. 1997); EEOC Guidance on Investigating, Analyzing Retaliation Claims, BNA Daily Labor Report at D-27 (May 26, 1998). For present summary judgment purposes, Egbuna established these three factors; in particular, he presented admissible evidence that it *was* for retaliatory reasons that TLLI refused to rehire him, so that "the adverse action was causally related to the protected expression." The question here is whether Egbuna is disqualified from proceeding *despite* satisfying these criteria, solely because of his undocumented status.

whether compensatory and punitive damages and injunctive relief are only available under Title VII, as amended, where an adverse action motivated solely by a discriminatory purpose causes actual economic damages is one of great importance, and one as to which at least four circuits (as well as this Court in *Faragher* and the other sexual harassment cases) have taken a position squarely contrary to the one TLLI ascribes to the Fourth Circuit. *See Hashimoto*, 118 F.3d at 674-76 (retaliatory negative job reference violates Title VII even if it was not the cause of a later refusal to hire by another employer); *Murphy v. Derwinski*, 990 F.2d 540, 543 (10th Cir. 1993); *EEOC v. L.B. Foster, Co.*, 123 F.3d at 754 n.4; *Smith v. Sec'y of the Navy*, 659 F.2d 1113, 1120 & n.57 (D.C. Cir. 1981); *see* Jt. App. 41-42, 87 (alleging and providing evidence on emotional distress damages).[6]

In sum, Title VII's prohibition against retaliation serves important public policies other than mere job protection. *See Hashimoto*, 118 F.3d at 674-76; *Wideman v. Wal-Mart Stores*, 141 F.3d at 1455-57; EEOC Guidance on Investigating, Analyzing Retaliation Claims, BNA Daily Labor Reports (May 26, 1998). Because of the public importance of encouraging victims of discrimination to come forward and witnesses to testify fully and freely, any retaliatory conduct by an employer that chills these protected activities is actionable. While the availabiilty and amounts of backpay, compensatory and punitive damages, and declaratory and injunctive relief would depend on the circumstances—including whether the harm suffered by

---

[6] Neither the mixed-motive issue decided in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), nor the partial legislative override of *Price Waterhouse* in the 1991 Civil Rights Act is relevant on this point. *See* Opp. Cert. 14-15 n.10. To paraphrase *McKennon*, "th[is] case comes to [this Court] on the express assumption that an unlawful motive was the sole basis for the [discriminatory adverse action.] . . . . The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was [not rehired] for the nondiscriminatory reason." Consequently, "[m]ixed motive cases are inapposite here. . . ." 513 U.S. 359-60.

the plaintiff would soon have been suffered anyway for some other non-retaliatory reason—the policies underlying 42 U.S.C. § 2000e-3 would be stymied if the employer could immunize itself from Title VII liability entirely by directing its unlawful retaliatory activity against its undocumented workers.

CONCLUSION

For the reasons stated above and in the Petition, this Court should issue a writ of certiorari to the Fourth Circuit, reverse the Fourth Circuit's holding that petitioner Obiora Egbuna is precluded from maintaining this action, and order this case remanded to the district court so that petitioner's employment discrimination action may proceed.

Respectfully submitted,

JOHN P. RACIN
WEISSBRODT & RACIN
1721 Lamont Street, N.W.
Washington, D.C. 20010
(202) 265-2516

NINA J. GINSBERG
DIMURO, GINSBERG
& LIEBERMAN
908 King Street, Suite 200
Alexandria, VA 22314
(703) 684-4333

MARSHA S. BERZON
MICHAEL RUBIN
(Counsel of Record)
KATHLEEN MORRIS
ALTSHULER, BERZON, NUSSBAUM,
BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Petitioner